Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

RALPH ELLIS LEYVAS,
Petitioner-Appellant,

v.

PEOPLE OF THE STATE OF CALIFORNIA;
KENNETH DOW,
Respondents-Appellees.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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72 pp

QUESTION PRESENTED

In the landmark case of Faretta v. California, 422 U.S. 806 (1975), this Court held for the first time that a defendant has a constitutional right to dispense with the assistance of counsel and to represent himself or herself. By so holding, the Supreme Court put the trial judge in an unenviable position. Whereas before, the focus had been solely on the constitutional necessity to provide counsel if a defendant's attempted waiver of the right to counsel was inadequate, in the wake of Faretta the judge is also bound by constitutional considerations to grant a request for self-representation if – as stated in Faretta – the defendant "knows what he is doing and his choice is made with eyes open". In the almost 40 years since Faretta was decided, trial judges have struggled mightily to reconcile the competing constitutional considerations set against each other by Faretta. However, determining whether a defendant who makes the critical (and, most often, devastating) decision to forego counsel "knows what he is doing" or acts "with eyes open" has proved to be so daunting that this and other Faretta issues have spawned more than 4,500 published appellate decisions, with no letup in sight. The time is now ripe for this court to revisit Faretta in order to establish clear, bright-line rules to better guide trial judges in negotiating the shoals of the Faretta dilemma.

The **question presented** is whether Faretta requires, as a constitutional imperative, (1) the basic warnings required in pre-Faretta decisions such as Von Moltke v. Gillies, 332 U.S. 798 (1948), particularly advice as to the penalty a defendant faces if convicted as charged; and (2) whether an unqualified, written waiver of the right to counsel should be required as a pre-requisite to exercise of the right to represent oneself.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The following opinions below are pertinent here, all of which are unpublished: Opinion on direct appeal by the California Court of Appeal, Fourth District, Division Two, affirming Petitioner's conviction and sentence, and denying his Faretta [Faretta v. California, 422 U.S. 806 (1975), hereafter "Faretta"] claim (7/13/98); Magistrate Judge's Report and Recommendation denying Faretta claim on federal habeas corpus (6/22/01) ; Judgment by the District Court for the Central District of California, Eastern Division, adopting the Magistrate's Report and Recommendation and dismissing with prejudice the Petition for Writ of Habeas Corpus (7/31/01) ; Memorandum Opinion by the United States Court of Appeals for the Ninth Circuit, affirming the District Court's dismissal of the Petition (2/19/03). All of these opinions are contained in the Appendix.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on February 19, 2003. The jurisdiction of this court is invoked under 28 USC § 1254(1).

STATUTORY PROVISIONS INVOLVED

The right of a state prisoner to seek federal habeas corpus relief is guaranteed in 28 USC § 2254. The standard for relief under "AEDPA" is set forth in 28 USC § 2254(d)(1).

STATEMENT OF THE CASE

On September 20, 1994, Petitioner RALPH ELLIS LEYVAS (hereafter "Petitioner") was charged in Riverside

County, California, with [1] transporting methamphetamine (Cal. Health & Saf. Code § 11379(a)), and [2] possessing methamphetamine (Cal. Health & Saf. Code § 11378). It was further alleged that Petitioner had suffered a prior conviction for violating section 11351. (See Cal. H&S Code § 11370.2(c) [3 year enhancement].) Petitioner pled not guilty and an attorney was appointed to represent him. After the lawyer failed to take action to prevent Petitioner's bail being revoked, Petitioner requested the right to proceed as his own attorney, assisted by appointed counsel. The court refused this request and required that Petitioner choose between continuing with previously appointed counsel or representing himself. Petitioner preferred the latter alternative, but refused to sign a written waiver of his right to counsel. The court interpreted this as a request for self-representation and, without advising Petitioner of the 10-year prison sentence he faced if convicted, ordered the matter to proceed with Petitioner acting as his own attorney. A jury convicted Petitioner on all counts, after which the court imposed a sentence of 6 years imprisonment.[1]

On direct appeal, Petitioner was represented by counsel, who claimed, inter alia, that Petitioner had been denied his Faretta rights because his waiver of counsel was

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[1]Petitioner had completed his sentence and parole period by the time that the matter was orally argued in the Court of Appeal. However, and as both parties agreed at and following oral argument, Petitioner has standing to continue to press his habeas claim based on the disabilities which attach from a criminal conviction. See, e.g., Prantl v. California, 843 F.2d 314 (9th Cir. 1988); Sanchez v. Mondragon, 858 F.2d 1462, fn.1 (10th Cir. 1988) ["the collateral consequences remaining from an unpardoned conviction are sufficient to preclude mootness"].

not knowing and intelligent. The Faretta claim was denied on direct appeal. Petitioner did not file a petition for review in the California Supreme Court, but renewed the Faretta claim on state habeas, augmented by a declaration from an experienced attorney who had represented Petitioner in the past. The California courts, including the California Supreme Court, summarily denied the Faretta claim on habeas corpus.

After exhausting his state remedies, Petitioner made the Faretta claim on federal habeas. In a judgment entered on July 31, 2001, the District Court adopted the magistrate's report and recommendation in its entirety, and entered judgment denying the petition for writ of habeas corpus with prejudice. Concurrently with a timely notice of appeal, Petitioner filed an application for Certificate of Appealability in the District Court, which was denied. However, the Ninth Circuit granted a COA on the Faretta issue.

In a Memorandum Decision filed in February 19, 2003, the Ninth Circuit affirmed the District Court's dismissal of the Petition.

A timely request for Certiorari in this court follows.

STATEMENT OF PERTINENT FACTS

Pre-Trial Proceedings in Riverside Superior Court

On March 29, 1995, Petitioner appeared before Hon. Richard Spitzer, and complained that his court-appointed attorney was "working with the government and against me." (RT 3/29/95 at 7.) His court appointed attorney declared a conflict. The court then called for another panel attorney, Mr. Sandquist. While Mr. Sandquist was on his way to court, Petitioner told Judge Spitzer that he was under a doctor's care for stress-related problems including high blood pressure and migraine headaches, and asked for the court's fax number in case he needed emergency treatment

and was unable to appear in court. The court gave Petitioner the fax number, took a recess, and Mr. Sandquist arrived. The court then advised Mr. Sandquist that the matter was set for preliminary hearing the following day, and Mr. Sandquist and Petitioner agreed to appear in court the next day at 1:30 pm.

On the following day, Petitioner, who had been under a doctor's care for migraine headaches and hypertension, appeared in court at 1:30 pm but became seriously ill, and was transported by the paramedics to Riverside Community Hospital via ambulance. Consequently, when the court called the matter at 2:50 pm, Petitioner was absent from court. The court inquired of Petitioner's court-appointed attorney, Mr. Sandquist, as to what had happened, but the lawyer did not tell the court anything about Petitioner's ongoing medical treatment. Rather, counsel merely stated that, after he and Petitioner had argued about the defense, Petitioner had told the deputy that he was not well and needed the paramedics. The court then stated that Petitioner had told the court the day before that "if he were forced to go to prelim today with an attorney with whom he was displeased he would get ill." (RT 3/30/95 at 16.) In fact, Petitioner had never said that to the court, but Mr. Sandquist did not make any effort to correct the court's erroneous recollection of the proceedings of the previous day. Consequently, the court found Petitioner's absence to be willful and forfeited the bail bond and issued a warrant for his arrest. The court then instructed the deputy to go to the Riverside Community Hospital and to arrest Petitioner "if he does not appear to be then receiving medical treatment." (RT 3/30/95 at 18.) Even though Petitioner's liberty was clearly at stake, Petitioner's counsel did not accompany the deputy to the hospital to

monitor the situation. When the deputy arrived at the hospital, Petitioner was in a hospital bed with chest and head pain, and had been given an injection of Demerol for pain. Nevertheless, the deputy arrested Petitioner and took him to the jail. Later that day, Petitioner was so ill that he was returned to the hospital for treatment. However, his bail remained revoked and his court-appointed counsel did nothing to attempt to set aside the bail forfeiture.

Upset by his court-appointed lawyer's failure to defend him against an unauthorized bail forfeiture, Petitioner asked to proceed as his own attorney, assisted by court-appointed counsel. The court refused, insisting that Petitioner choose between being represented by the public defender or representing himself. Faced with only those two choices, Petitioner initially asked to represent himself, but refused to sign a written waiver of counsel. The court then ordered Petitioner to proceed pro se.

On April 14, 1995, Petitioner signed a form entitled "Petition to Proceed in Propria Persona". However, the form was signed "under protest" and accompanied by more than half a dozen handwritten statements insisting that he wanted "all my rights" and refusing to waive any. (CT 19.) That same day the matter was called for preliminary hearing. The court denied the request to proceed in pro per on the basis that Petitioner's simultaneous refusal to unequivocally waive his right to counsel was "obstructionist". (CT 15.) The district attorney urged the court to find that Petitioner's Faretta waiver had *not* been unequivocal; that he "is not truly willing to freely and voluntarily waive his right to an attorney"; and, therefore, that the court should reappoint counsel for the preliminary hearing. (CT 53-54.) The court agreed that Petitioner was "equivocating", and on that basis revoked

Petitioner's self-representation status and re-appointed Mr. Sandquist. After a lunch recess, the court then inquired of Mr. Sandquist whether the matter should be referred for competency proceedings. Mr. Sandquist responded that Petitioner "has represented himself many, many times. And nobody has ever found him 1368." (CT 38-39.) Counsel's representation was untrue: Petitioner had only represented himself once before, on a matter which resulted in time served. Nevertheless, the court conducted no further inquiry as to Petitioner's competence.

After being represented at the preliminary hearing by Mr. Sandquist and being bound over for trial, Petitioner retained private counsel to appear at his superior court arraignment. However, the attorney whom Petitioner had retained did not appear, and sent in his stead an attorney whom Petitioner had never met, and who appeared late for court. Petitioner declined to proceed with this other lawyer representing him. The court noted that Petitioner had been acting "inappropriately", but interpreted this conduct as a continuing Faretta waiver. Hence, the court set the matter for trial with Petitioner proceeding pro se, even though Petitioner had refused to unconditionally waive his right to counsel in writing and even though the court had never advised Petitioner of the 10-year penalty he faced if convicted as charged.

On November 3, 1995, Petitioner requested a continuance of 90 more days. The People opposed the motion. The court stated that "a more threshold matter is whether this defendant is going to continue to go pro per. He's gone back and forth." (RT 11/3/95 at 37.) Petitioner responded that he had "always wanted counsel, as I don't know the law", but that his privately retained attorney had

taken his $10,000 without doing anything or refunding any of his money, and that the court-appointed lawyer had negligently permitted him to be taken into custody on a "bail violation" when Petitioner became ill and had to leave the courtroom to get medical assistance. Petitioner then referred again to his serious health problems:

> MR. LEYVAS: Your honor, I have been in the hospital and I have been sick. I have migraine headaches and high blood pressure, so it's hard for me to do this by myself.

Finally, Petitioner stated: "I would accept an attorney today by the Court if he will uphold my constitutional rights." (RT 11/3/95 at 39:27-28.)

In response, the court insisted that Petitioner had to choose between representing himself and being represented by an attorney, whereupon Petitioner responded that he'd prefer to get the money back from his previously retained counsel, who had been paid $10,000 but who hadn't shown up in court, and use that money to retain new counsel. The court refused to entertain that issue and insisted that Petitioner "either fill out the application for a court-appointed lawyer or we are going to proceed pro per." (*Id.*, at 44: 17-81.) Petitioner then responded: "OK, pro per. Forcing me to do this." (*Ibid.*) The court then continued Petitioner's pro-per status and postponed the case until later in the month.

On November 27, 1995, Petitioner appeared in pro per for consideration of the motions he had filed. The court proceeded to deny Petitioner's motions for transcripts of previous hearings, for an independent investigator, to examine the money the prosecution claimed to be "drug-tainted". Petitioner also requested appointment of co-counsel

to assist him, which the court refused.

On April 26, 1996, Petitioner appeared before a new judge on a motion to suppress pursuant to § 1538.5, but the motion had been improperly filed. Petitioner asked for an attorney to be appointed to handle the motion, and the court appointed the public defender for that purpose. However, the public defender refused to serve as co-counsel and instead asked Petitioner, "Mr. Leyvas, you want to be your own lawyer; is that what you want?" Petitioner replied "yes", but indicated to the court that he still wanted counsel "as long as they don't take control of my case." The court then determined that Petitioner had elected to proceed with the trial as his own lawyer, and that "we will show that he is once again waiving his right to be represented by an attorney and will continue to represent himself."

Trial

On May 9, 1996, the matter was called for trial, with Petitioner in custody and appearing in pro per. Petitioner complained that the jailers were not giving him his medication, as a result of which he was getting migraine headaches, without which he could not concentrate properly in court. The court ordered that Petitioner be granted law library use and that his wife could serve as his "investigator" (even though his wife lacked any training as an investigator), but did not act on the request for medication.

On May 13, 1996, before the jury was brought in, Petitioner complained that the court's order regarding library use was being ignored and that he hadn't been able to have any contact with his "investigator" (i.e., his wife, Mrs. Leyvas). The court reiterated that Petitioner was to have law library privileges but denied any continuance to enable Mrs. Leyvas to obtain and serve subpoenas. During jury selection,

Petitioner continued to complain that he was not receiving his medication; the court responded, "I don't want to talk about your medicine." Shortly thereafter the prosecutor gave his opening statement. When the prosecutor finished, Petitioner tried to give an opening statement but started to tell the jury about his migraine headaches and the jailers' refusal to give him his medication, at which point the court cut him off, admonished Petitioner, and took the noon recess. After the recess, the prosecutor commenced calling witnesses. When the jury was excused for the day, the parties met in chambers, whereupon Petitioner asked the court "how much time am I looking at if I am convicted on this?" (RT 162:22.) After conferring with the prosecutor and checking the law, the court told Petitioner – for the first time – that he was facing *10 years* in prison.

On May 16, 1996, the trial resumed. Neither Petitioner nor his wife managed to issue any subpoenas and therefore were unable to call as a witness the passenger, who had an extensive criminal record which included drug sales. Moreover, because Petitioner could not successfully require the prosecution to produce the "drug tainted" money, it was impossible to rebut that allegation. Hence, Petitioner's defense consisted entirely of calling just a single witness who appeared voluntarily – his stepdaughter – who testified that she had withdrawn $8,000 from her bank account on August 8, 1994, which she had loaned to her father and some of which was in his possession Petitioner was arrested.

On May 23, 1996, the jury returned its verdict after little

or no deliberation at all,[2] finding him guilty as charged.

Sentencing; Direct Appeal; State Habeas Corpus

On July 12, 1996, after the verdict but prior to sentencing, Petitioner, assisted by a former attorney, filed a state habeas corpus petition claiming that his federal constitutional rights were violated by the court's allowing him to proceed as his own lawyer without making the required preliminary determination of his competency, without properly giving him his Faretta warnings, without advising him of the sentence he faced, and without a proper finding that Petitioner's waiver of counsel was knowing, intelligent, and voluntary. It was supported by the declaration of Robert Hanson, Esq., an experienced local criminal attorney, who had been actively involved in the presentation of the Faretta case before the U.S. Supreme Court, and who had represented Petitioner in several matters over the past 15 years. Attorney Hanson's declaration noted that Petitioner had dropped out of school in the eighth grade, suffered from migraine headaches that caused blackouts, was unable to think rationally and logically to determine the issues confronting him, and "should never be approved to go into a criminal court room in his own defense where he faces long term prison consequences." The declaration went on to relate that in, in representing himself previously, Petitioner had been so irrational that he "simply possessed no logic nor rational ability to see, comprehend, or understand how to raise a defense to a criminal charge" and "did not grasp what the prosecution must prove". Mr. Hanson reviewed the

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[2]The record states that the jury reached a verdict at 1:20 pm, even *before* being deliberations at 1:45.

transcript of the Faretta proceedings in Riverside Superior Court and identified more than 10 instances illustrating that "because of mental problems and severe medial disabilities, no court should have allowed this defendant to literally 'commit suicide' by representing himself."

The Riverside Superior Court summarily denied the state habeas petition. The habeas petition was then filed in the Fourth Appellate District, which summarily denied it as well. On April 30, 1998, Petitioner filed the habeas petition in the California Supreme Court.

On July 13, 1998, while the state habeas corpus petition was still pending in the California Supreme Court, the Court of Appeal issued a written opinion affirming the conviction on direct appeal. In the course of the opinion, although addressing the Faretta claim, the court did not refer at all to the habeas corpus petition or to any of the facts submitted in support of it, none of which was contained in the record on appeal. Rather, ruling solely on the basis of the appellate record, the Court of Appeal found, inter alia, that petitioner had knowingly waived his right to counsel and that he was provided "meaningful self-representation".

On Sept. 30, 1998, the California Supreme Court denied the state habeas petition raising the Faretta claim in a one-word order.

Proceedings on Federal Habeas Corpus

Having exhausted his state remedies, Petitioner filed a federal petition for writ of habeas corpus in which he continued to complain that his Faretta rights had been violated. On June 25, 2002, the magistrate recommended that the Faretta claim be denied and that the petition be dismissed with prejudice. Petitioner filed timely objections arguing, inter alia, that the magistrate had erred in

concluding that Petitioner's request to represent himself was "unequivocal"; that Petitioner had not waived his right to an attorney orally or in writing, as required by the Constitution; and that Petitioner was not advised, at the time his Faretta waiver was taken, of the maximum 10-year prison sentence he faced if convicted, thus violating the requirement that he be advised as to "penalty".

Notwithstanding the Objections, the District Court adopted the Magistrate's Report and Recommendation in its entirety. On July 31, 2002, judgment was entered denying the Petition with prejudice. The Ninth Circuit granted a Certificate of Appealability on the issue of "whether the trial court violated [Petitioner's] rights under Faretta v. California" [supra].

On February 19, 2003, the Court of Appeal issued an unpublished, memorandum opinion, affirming the District Court's dismissal of the Petition. As pertinent here, the Ninth Circuit panel found that the California court's rejection of the Faretta claim was not contrary to or an unreasonable application of clearly established Supreme Court law, because the state court had reasonably determined that Petitioner's waiver of his right to counsel was "unequivocal"; and because "No Supreme Court decision requires the court to impart ... information [regarding the maximum penalty the defendant faces if convicted]."

Petitioner now requests a Writ of Certiorari from this court as to the issues raised by the Ninth Circuit's decision.

REASONS FOR GRANTING THE WRIT

1. The decision of the Ninth Circuit, concluding that this Court does not require advice as to the maximum penalty a defendant faces in order for a Faretta waiver to be found

"knowing and intelligent", conflicts with the decisions of this Court and those of other circuit courts.

The record in this case is absolutely clear and uncontradicted that Petitioner *was not advised of the maximum sentence he faced (10 years imprisonment) when his Faretta waiver was taken*. Rather, this key advisement was made for the *first* time in the middle of Petitioner's trial, by which time the die had been cast and he was representing himself.[3]

Petitioner emphasized and re-emphasized this critical point in the Circuit Court, pointing out that Ninth Circuit cases had clearly and repeatedly held that advice as to the "possible penalties" is *required* before a waiver of counsel can be accepted as "knowing and intelligent". See, e.g., United States v. Farhad, 190 F.3d 1097, 1099 (9th Cir. 1999) ["A waiver of counsel will be considered knowing and intelligent *only* if the *defendant is made aware of ... (2) the possible penalties.*"] [emphasis added]. See also United States v. Balough, 820 F.2d 1485, 1487 (9th Cir. 1987) [same, citing Faretta].

The Ninth Circuit recognized that advice of possible penalties is required as a matter of circuit law, but its opinion concludes, without discussion or analysis, that advice as to penalty is *not* a requirement imposed by any U.S. Supreme Court decision:

> The state court did not unreasonably apply Supreme Court law by failing to inform Leyvas of the sentence he faced. *No Supreme Court decision*

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[3]"The record reflects that the trial judge first informed Petitioner of the maximum sentence he faced on May 15, 1996, during trial." (Magistrate's Report and Recommendation, Appendix, at p.xxiv.)

> *requires the court to impart that information.* The court must ensure the defendant is aware of the "dangers and disadvantages of self-representation," *id. at 835,* but this requirement does not clearly extend to information about potential penalties.

Leyvas v. People, slip opn. at 2 [emphasis added].

The Ninth Circuit's core conclusion – that this Court does not require advice as to penalty at the time a Faretta waiver is taken – is contrary to the jurisprudence of this Court and of several of the circuit courts.

In Von Moltke v. Gillies, 332 U.S. 708, 724 (plurality opinion of Black, J.), a pre-Faretta case, this Court rejected a waiver of counsel because it did not comply with several specific requirements, one of which was advice by the court as to "the range of allowable punishments":

> To be valid such a waiver *must* be made with an apprehension of the nature of the charges, the statutory offenses included within them, *the range of allowable punishments* thereunder, possible defenses to the charges and the circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

Ibid [emphasis added].

This Court has recognized the "validity" of the decision in Von Moltke by citing it with full approval in other, post-Faretta decisions. See, e.g., Penson v. Ohio, 488 U.S. 75, 86-87 (1988); Patterson v. Illinois, 487 U.S. 285 (1988). Circuit Courts have similarly treated Von Moltke as expressing the requirements for a valid waiver of counsel. See, e.g., Wilkins v. Bowersox, 143 F.3d 1006, 1013, fn.5 (8th Cir. 1988) ["Fifty years ago, in Von Moltke [supra], the Supreme Court

established the requirement that a judge's inquiry regarding waiver of counsel must be comprehensive and probing."]

Although Von Moltke is, as noted, a pre-Faretta decision, there should be no question that its requirements apply in the Faretta context. Particularly instructive in that regard is United States v. Padilla, 819 F.2d 952 (10th Cir. 1987), which applies this principle in a context strikingly similar to the one presented by the instant case.

In Padilla, as here, the defendant claimed that the court had committed Faretta error by failing to obtain a knowing and intelligent waiver of the right to counsel; and in Padilla, as here, the record showed that the purported waiver had occurred after the defendant "found his appointed and retained counsel ineffective because they would not structure a defense as he directed." Padilla, supra, at 956. In response, the Padilla court explained that there are two distinct steps in the Faretta analysis, the first one being to determine that the defendant's choice to proceed pro se instead of with counsel is a "voluntary" one. The Padilla court found that, because the Sixth Amendment provides no right to counsel "blindly following a defendant's instructions", a defendant's groundless objections to appointed counsel necessitate a "choice" between continuing with present counsel or proceeding pro se. Accordingly, requiring that the defendant choose between accepting appointed counsel with whom he is dissatisfied and proceeding pro se is, in the constitutional sense, a "voluntary" decision to waive counsel. Petitioner has no quarrel with this principle, and acknowledges that, like the defendant in Padilla, Petitioner's election to proceed pro se was "voluntary" in the constitutional sense.

However, a finding that the decision to proceed pro se is voluntary is only the first of the two critical inquiries the

trial court must conduct to comply with the constitutional imperatives of Faretta. Second - and equally if not more important - is that the court must make sure that the defendant's purported waiver of counsel is "knowing and intelligent". Indeed, even if the court suspects that the defendant is trying to "manipulate" the system[4] - the precise allegation leveled at Petitioner here - the court must still establish that a Faretta waiver is knowing and intelligent; and *that* determination *requires* that the defendant be advised, inter alia, of the "range of allowable punishments". The Padilla court's analysis in this regard is fully applicable here:

> Even when a district court suspects manipulation on the part of a criminal defendant who seeks substitution of counsel, it must balance the need for efficient administration of the criminal justice system against the defendant's right to counsel. The Supreme Court has stated: "When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent

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[4]Whether a defendant is, in fact "manipulating" the system or the system is manipulating the defendant is not always clear. For example, the Magistrate opined below that Petitioner "appeared willing to go to some lengths to proceed only if he got his way", relying on a statement by a trial state judge that Petitioner had threatened to "get sick" if forced to proceed with an attorney who did not follow his instructions. An examination of the record, however, reveals no such statement or warning by Petitioner. Meanwhile, the habeas record demonstrates that Petitioner *was* sick, and very much so – suffering from hypertension and migraine headaches of such severity that Petitioner had previously passed out in court and was, at the relevant times, under the active care of a specialist in neurology.

himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits."

While the record establishes defendant's decision to proceed pro se was voluntary, the question remains whether his choice was made knowingly and intelligently. Faretta requires a showing on the record that the defendant who elects to conduct his own defense had some sense of the magnitude of the undertaking and the hazards inherent in self-representation when he made the election. The task of ensuring that defendant possesses the requisite understanding initially falls on the trial judge, who must bear in mind the strong presumption against waiver. To be valid such waiver *must* be made with an apprehension of the nature of the charges, the statutory offenses included within them, *the range of allowable punishments thereunder,* possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered. Von Moltke, 332 U.S. at 723-24.

This court has reiterated that the factors articulated must be conveyed to the defendant by the trial judge and *must* appear on the record so that our review may be conducted without speculation. *Because the record in this case fails to*

> *demonstrate the district court made the thorough and comprehensive examination of all the facts and circumstances contemplated by Von Moltke and its progeny, we cannot say Mr. Padilla made a knowing and intelligent waiver of his right to counsel.*

Padilla, supra, 819 F.2d at 956-957 [omitting, for present purposes, all interior citations other than to Von Moltke] [emphasis added].

Several other decisions from the Tenth Circuit and elsewhere embrace Padilla's incorporation of the Von Moltke elements into the requirement of a valid waiver of counsel pursuant to Faretta. See, e.g., United States v. Silkwood, 893 F.2d 245, 248 (10th Cir. 1989), citing Von Moltke, supra ["For a waiver to be knowing and intelligent, the court must conduct a 'penetrating and comprehensive examination' into ... the range of allowable punishments."; Sanchez v. Mondragon, 858 F.2d 1462, 1467 (10th Cir. 1988) [same, citing Von Moltke]; Buhl v. Cooksey, 233 F.3d 783, 791 (3rd Cir. 2000) ["... Once a defendant waives representation by counsel and asserts the constitutional right of self-representation at a criminal trial, the trial court must 'fully inform him ... of ... the possible penalties ..."]; United States v. Bailey, 675 F.2d 1292, 1299 (D.C. Cir. 1982), citing Von Moltke ["To be valid such a waiver must be made with an apprehension of ... allowable punishments ..."]; Fowler v. Collins, 253 F.3d 244, 249 (6th Cir. 2001) [same, citing Von Moltke]; Shafer v. Bowersox, 168 F.Supp.2d 1055 (E.D.Mo. 2001) [Von Moltke sets out "clearly established federal law" as determined by the Supreme Court of the United States, as required by 28 USC § 2254(d)(1)].

In sum, and based on the jurisprudence of *this* Court, a trial court's determination that the defendant has

"voluntarily" elected to represent himself by his unjustified refusal to accept appointed counsel is meets only half of the Faretta requirement. The other half - a determination that the purported waiver of counsel is "knowing and intelligent" - *requires* an advisement which meets the minimum standards set forth in Von Moltke, and the latter clearly and expressly requires a contemporaneous admonition to the defendant of *the maximum penalties* he faces in the [likely][5] event that if the defendant waives counsel and goes to trial pro se, s/he will be found guilty as charged.

Thus, and contrary to the core holding by the Ninth Circuit in this case, this Court's jurisprudence *does* require advice as to the applicable maximum penalties before a trial court can validly accept a Faretta waiver. The Ninth Circuit therefore erred in its central finding that "No Supreme Court decision requires the court to impart that information [i.e, the range of allowable penalties the defendant faces]".

Accordingly, this Court must grant review to resolve a conflict between the Ninth Circuit's holding in this case and the contrary holdings by this Court and several other circuit courts.

2. The vast proliferation of Faretta cases cries out for clarification of the Faretta rules by this Court regarding the content of the required warning for a valid waiver of counsel, and the necessity for a defendant to make an unqualified waiver of the right to counsel as a pre-condition to invoking the right to self-representation.

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[5]"[T]he right to self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant ..." Johnstone v. Kelly, 808 F.2d 124, 217 (2nd Cir. 1986).

As this is being written, Shepard's Citations indicates more than 4,500 published decisions citing Faretta, with more decisions coming out almost every week. This vast proliferation of Faretta decisions creates a major drain on the scarce judicial resources of state and federal courts already buckling under the weight of over-crowded dockets and a scarcity of judges.

A number of powerful forces have converged to produce the tide of Faretta litigation. The first is a natural tension between the right to counsel and the right of self-representation, creating a damned-if-you-do, damned-if-you-don't scenario which tends to result in appellate litigation no matter what the trial judge does. As one federal court has noted:

> A trial court's evaluation of an individual's desire to represent himself is fraught with the possibility of error. Because self-representation necessarily entails the waiver of the sixth amendment right to counsel, a trial court can commit reversible constitutional error by either improperly granting a request to proceed pro se – and thereby depriving the individual of his right to counsel – or by denying a proper assertion of the right to represent one-self, and thereby violating Faretta.

Cross v. United States, 893 F.2d 1287, 1290 (11th Cir. 1990).

Given a situation in which, by definition, a trial judge is likely to be appealed no matter what s/he does about Faretta, it is hardly surprising that defendants, especially those experienced in the criminal justice system, have attempted to "manipulate" it to their advantage by "setting up" Faretta situations. On the other hand, given the

substantial number of reversals in the appellate courts based on Faretta error, it is unrealistic to place the blame for the Faretta litigation explosion solely on the shoulders of crafty defendants. Many defendants come to court burdened with mental and physical disabilities, in some instances exacerbated by a failure of overtaxed correctional staff to provide necessary medication, which impair the ability to make clear choices in difficult, inherently stressful situations. Public defenders, assigned tens or even hundreds of cases on a single day, often lack the time or patience to carefully explain the Faretta alternatives to their clients, who then begin to lose confidence in their attorneys, especially when things go wrong in other aspects of the case. Finally, trial judges themselves, burdened with over-crowded dockets, can become exasperated with defendants who refuse to make clear choices in the short time allotted for their individual cases, making it tempting to use self-representation as a "punishment" for defendants who refuse to cooperate with their court-appointed lawyers, whatever the reason.

The combination of these powerful, synergistic forces, converging in a situation "fraught with the possibility of error", is a recipe for a flood-tide of appellate litigation, and that is exactly what has happened with the Faretta doctrine. Clear guidance from this Court in the way of some basic rules to more clearly define the Faretta equation would go a long way toward stemming the Faretta tide. As yet such rules have not clearly emerged. In Faretta itself, this Court held that, before a trial judge can take a Faretta waiver of counsel in order to proceed pro se, the court must be sure that the defendant "knows what he is doing and his choice is made with eyes open." Faretta, at 835, quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942).

Nevertheless, this Court has stopped short of more specifically defining what is meant by a defendant's "knowing what he is doing" or acting "with eyes open". Rather than clarifying these vague terms with specific limits or requirements, this Court has left it up to the individual trial courts to craft the specific procedures that must take place in order for the right to self-representation to be validly exercised. See, e.g., United States v. Moya-Gomez, 860 F.2d 706, 732 ["The Supreme Court has not yet defined precisely the extent of the Faretta inquiry."] The result has been a plethora of various approaches which, while well-intentioned, have fed the deluge of Faretta cases which now inundates the state and federal courts.

Granting review in this case, however, would enable this court to revisit Faretta and to spell out at least a couple of bright-line rules which would preserve and strengthen Faretta's constitutional foundation while, at the same time, stemming the choking flow of appellate litigation over Faretta issues. In this regard, Petitioner respectfully suggests two basic, clarifying "Faretta" rules which can and should be announced by this Court, both of which are clearly suggested by the facts of the instant case.

The first is the one discussed in the previous section of this Petition, namely that this Court should clarify that the Von Moltke warning is constitutionally required before a Faretta waiver of counsel can be accepted by a trial judge.

Although Faretta makes clear that a waiver of the right to counsel must be "knowing and voluntary", those terms themselves lack clear definition, and Faretta's mention of "knowing what one is doing" or "having one's eyes open" are not sufficient to give those terms a clear, defined, and consistent meaning. The Von Moltke warning, in contrast,

contains specific elements which succinctly cover the basic requirements necessary to a knowing and voluntary waiver of the crucially important right to counsel. Specifically, Von Moltke requires that, in order for a waiver of the right to counsel to be valid, the court must advise the defendant of the following basic elements as they apply to his or her individual case: (1) the nature of the charges; (2) the statutory offenses included within them; (3) the range of allowable punishments thereunder; (4) possible defenses to the charges and circumstances in mitigation thereunder; and (5) other facts essential to a broad understanding of the whole matter. Von Moltke, supra, 332 U.S. at 724. As we have argued in the previous section, this Court has held in cases other than Faretta that a valid waiver of the right to counsel must be accompanied by the trial court's imparting of the Von Moltke warnings. See, e.g., Penson v. Ohio, supra, 488 U.S. 75, 86; Patterson v. Illinois, supra, 487 U.S. at 298, citing Von Moltke. As written, however, the Faretta decision itself did not expressly incorporate Von Moltke. As a result, although some federal courts require Von Moltke advisements in the Faretta context as a constitutional matter, see, e.g., United States v. Padilla, supra, 819 F.2d at 956 [10th Cir.], the Ninth Circuit in the present case holds that "No Supreme Court decision requires the court to impart that information." People v. Leyvas, supra, slip opn. [adverting to the failure to advise Leyvas of "the sentence he faced"]. By granting review in this case, this Court would have an opportunity to clarify that a decision to represent oneself necessitates a waiver of the right to counsel; and that, for such a waiver to be valid, it must, as a constitutional matter, contain the specific warnings contained in Von Moltke. Such a holding by this Court would not only address the constitutional

violation in this specific case, but would, by clearly requiring Von Moltke warnings in all Faretta situations, provide a virtually error-free warning that trial judges could use to make sure that Faretta waivers are constitutionally valid.

Second, this Court could and should make clear that, to invoke Faretta's right to self-representation in the first place, a defendant must make an express, unequivocal, *written* waiver of the right to counsel.

Faretta itself notes that the defendant there "clearly and unequivocally declared to the trial judge that he ... did not want counsel." Faretta, supra, 422 U.S. at 835. At the present time, all the circuits interpret Faretta to require that any decision to proceed without counsel be "unequivocal". See, e.g., cases collected in Buhl v. Cooksey, supra, 233 F.3d at 790. However, this Court has not clearly defined what "unequivocal" means, and that term does not define itself very well.[6] As a result, each of the circuits goes its own way in determining how to discern whether a waiver is "unequivocal" enough to meet the Faretta requirement in this regard. Compare, e.g., Tuitt v. Fair, 822 F.2d 166 (1st Cir. 1987) [express waiver of counsel is "prerequisite" to invocation of Faretta right to self-representation]; Gomez v. Collins, 993 F.2d 96 (5th Cir. 1993) [even though waiver phrased in "unequivocal language", held to be "equivocal" because prepared by fellow inmate]; United States v. Oakey, 853 F.2d 551, 553 (7th Cir. 1988) [request to proceed pro se

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[6]The Oxford University Press defines "unequivocal" as "leaving no doubt" or "unambiguous". Yet, for example, the Ninth Circuit in the present case found Petitioner's waiver of counsel to be "unequivocal" even though Petitioner refused to waive his right to counsel in writing, and even though at least one state judge revoked Petitioner's Faretta status at one point precisely because it found him to have "equivocated".

properly denied where "ambiguous"]; Hamilton v. Groose, 28 F.3d 859, 862 (8th Cir.1994) ["ambiguous" language in motion and questionable motives renders request "equivocal"]; United States ex rel. Maldonado v. Denno, 348 F.3d 12, 16 (2nd Cir. 1965) [accused must "unmistakably commit himself" to conducting own defense]; Munkus v. Furlong, 170 F.3d 980, 983 (10th Cir. 1999) [clear and unequivocal declaration of intention to represent self is first of several requirements defendants must meet to invoke right of self-representation]; Dorman v. Wainwright, 798 F.2d 1358, 1366 (11th Cir. 1986) [sufficient to state request, orally or in writing, "so that no reasonable person can say that the request was not made"]; Adams v. Carroll, 875 F.2d 1441, 1444 (9th Cir. 1989) [if defendant equivocates, he is "presumed" to have requested the assistance of counsel].

Given the lack of specific guidance from this Court as to what "unequivocal" means in the Faretta context, and the various approaches that lack of clarity has spawned, the flood of Faretta litigation is predictable. By the same token, this tide of Faretta litigation can be stemmed by this Court taking the Faretta bull by the horns and setting a clearer and more consistently administered standard of "unequivocality" than presently exists. Granting certiorari in the instant case would provide an excellent opportunity for this Court to do that.

In particular, this Court should consider holding that an unequivocal *written* waiver of the right to counsel is a constitutional prerequisite to exercising the right of self-representation under Faretta.

To begin with, unless a defendant is willing to clearly, and expressly waive the right to counsel, there is no constitutional basis for the exercise of the right to self-

representation in the first place. A defendant is cloaked with the right to counsel when criminal proceedings begin, and can only invoke the right to self-representation by waiving the right to counsel s/he started out with. As explained by one circuit court:

> Unlike the prophylactic right to counsel, which exists to preserve a defendant's fair trial concerns until it is affirmatively waived, the right to self-representation is implicated only when a defendant decides to waive his right to counsel.

Munkus v. Furlong, supra, 170 F.3d 980, at 983. In other words, the defendant starts out clothed with the precious right to counsel, which includes within it all the other rights that a litigant could reasonably hope to exercise at trial. The right to self-representation, however, does not even come into being until the right to counsel is knowingly and intelligently waived. Hence, it is logical, sensible, and constitutionally appropriate to require that the right to counsel be clearly and unambiguously waived as a *pre-requisite* to the invocation of the right to self-representation to become a "right" in and of itself. In short, a defendant should be required to waive his right to counsel clearly and unambiguously before any Faretta right matures in the first place.

Indeed, this approach is the one taken in Tuitt v. Fair, supra, where the First Circuit approved of the Massachusetts state rule, which insists that the right to proceed pro se be conditioned upon an express and unequivocal waiver of the right to counsel:

> In the present case, the state trial judge -- seeking to follow the established rule that the right to proceed pro se entails an affirmative,

knowing and intelligent waiver of the right to counsel -- thought it proper to seek an unequivocal, express waiver of the right to counsel as a prerequisite to granting defendant's motion to represent himself. The Massachusetts Supreme Judicial Court approved his approach. This is the approach the Ninth Circuit required in Meeks v. Craven, 482 F.2d 465. Given the difficulty that can ensue if a waiver is not fully established, we see nothing wrong in such a requirement.

The right to counsel is, in a sense, the paramount right; if wrongly denied, the defendant is likely to be more seriously injured than if denied his right to proceed pro se. Accordingly, we think that requiring an express waiver of the former right before recognizing the latter is a defensible procedure.

Id., at 176-177.

Moreover, imposing a stringent requirement that a defendant clearly and unequivocally waive the right to counsel as a pre-condition to eligibility for Faretta's right of self-representation would further this court's long-standing policy to indulge every reasonable presumption against the waiver of the precious right to counsel. As a court in the District of Columbia circuit stated in adopting an approach similar to that in Tuitt:

Because the exercise of the right of self-representation necessarily involves a waiver of the preeminent right to the assistance of counsel, the stringent limitations established by the Supreme Court for waiver of the right to

> counsel necessarily define the requirements for exercise of the right of self-representation. Thus the Court's decisions establish that the mere failure of a defendant to request counsel will not result in a waiver of the right to counsel.. Since a defendant must act affirmatively to relinquish the right to counsel, it follows that the right of self-representation is waived if not asserted; for only if the defendant asserts the right to proceed pro se will it be possible for a court to find the requisite waiver of the right to counsel.
>
> Similarly, because the Supreme Court has enjoined courts to "indulge in every reasonable presumption against waiver" of the right to counsel, a defendant must "articulately and unmistakably assert[] his desire to avail himself of the constitutional right to self-representation . . . ." Given the strong presumption against waiver of the right to counsel, such a stringent standard for judging the adequacy of an assertion of the right of self-representation, involving as it does a waiver of the right to counsel, is entirely appropriate.
>
> So also, a defendant who adopts equivocal positions regarding a request to proceed pro se may properly be held to have waived the right of self-representation.

United States v. Weisz, 718 F.2d 413, 425-426 (D.C. Cir. 1983), citing Brewer v. Williams, 430 U.S. 387, 404 (1977).

Once one has acknowledged that an unconditional, express waiver of the right counsel is a necessary *pre-requisite* to invocation of the right to counsel – as the above decisions,

including this Court's own jurisprudence, powerfully suggest – a requirement that the waiver be in writing in order to be valid naturally emerges. A defendant's refusal to waive the right to counsel in writing can't reasonably be deemed an "unconditional" waiver, since it necessarily involves some condition under which the defendant is unwilling to waive the right to a lawyer. Accordingly, requiring a written waiver is fully consistent with the requirement that the wavier be "unconditional", and therefore puts no additional burden on a defendant seeking to represent himself than that which already exists. Put another way, a defendant who is unwilling to execute a written, unconditional waiver of the right to counsel is failing or refusing to execute the kind of "unequivocal" waiver of counsel , without which the Faretta right doesn't come into being in the first place.

At the same time, requiring a written Faretta waiver would prevent cases like the present case and hundreds like it from ever reaching the appellate courts. In the instant case, Petitioner refused to unconditionally waive his right to counsel in the "Faretta" form he was given to sign. Nevertheless, lacking clear guidance from this Court in the matter, the trial judge found Petitioner to have executed a valid Faretta waiver and allowed him to proceed to trial as his own lawyer, despite the lack of the written waiver. Predictably, Petitioner's trial was a farce and he was convicted by a jury even before they began deliberating. And, equally predictably, Petitioner's appellate counsel was compelled to raise a Faretta claim and did so. None of this would have happened had a written Faretta waiver been a constitutional imperative. Petitioner's refusal to execute an unequivocal written waiver of the right to counsel would

have rendered him constitutionally unqualified to invoke his right to self-representation, because that right would never have matured. Accordingly, the trial court would have been required to deny self-representation status and Petitioner would have had to go to trial with an appointed lawyer. Granted, he still could have been convicted even with representation by a lawyer, but if that occurred, he would have no Faretta claim to raise on appeal, because, as a constitutional matter, his refusal to sign the written waiver of counsel would necessarily have rendered any Faretta claim null and void from the outset.

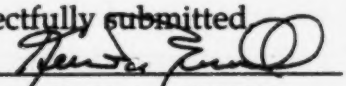
CONCLUSION

The time for the bright-line rules suggested here (and possibly others that this Court might impose upon granting review in this case and, thereby, revisiting Faretta) is long overdue, not only to cut down on appellate litigation over Faretta issues, but also to assist trial judges with the dilemma they face as a result of having to apply Faretta without more guidance from this Court.

Based on the foregoing, this court should grant the petition for writ of certiorari and hear this case on the merits.

Dated: May 13, 2003.

Respectfully submitted,

By: 

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Attorney for Petitioner
RALPH ELLIS LEYVAS

APPENDICES

A.
Opinion on Direct Appeal

B.
U.S. Magistrate Judge's Report and Recommendation

C.
U.S. District Court Judgment

D.
United States Court of Appeals for the Ninth Circuit
Affirmance of Judgment

E.
Statutes

Appendix A

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

THE PEOPLE,
Plaintiff and Respondent,
v.
RALPH ELLIS LEYVAS,
Defendant and Appellant.

E019195
(Super. Ct. No. CR58620)

OPINION

APPEAL from the Superior Court of Riverside County. Timothy J. Heaslet, Judge. (Judge of theMunicipal Court, assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const) Affirmed.

Richard Jay Moller, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel B. Lundgren, Attorney General, George Williamson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Jeffrey J. Koch and Garrett Beaumont, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Ralph Ellis Leyvas appeals after be was convicted by a jury of transportation of methamphetamine and possession of methamphetamine for sale. (Health & Saf. Code, §§ 11379, 11378). Defendant raises a cluster of issues, essentially dealing with complications arising from his decision to represent himself under *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525; 45 L.Ed2d

5623.] None of the contentions on appeal is meritorious; we affirm.

FACTS AND PROCEDURAL HISTORY

At approximately 10 or 11 p.m. on August 31, 1994, an off-duty motorcycle patrolman was on his way borne when he saw defendant's truck make a left-hand turn against a red light. Defendant, who was driving, also stopped in the intersection to put on his safety belt. The officer pulled defendant's truck over. As the officer approached after making the stop, he smelled a strong odor of burnt marijuana coming through the open driver's window from the cab of the truck. Defendant and his passenger, Bobby Jolly, both denied smoking marijuana. Defendant appeared to be under the influence of alcohol or some drug.

The traffic officer then called a K-9 unit and a backup unit to respond. Officer Mendenlall, the K-9 handler, also smelled marijuana in the cab of the truck His police dog alerted to the gasoline cap cover by scratching on it. Officer Mendenhall opened the cover, and found two baggies of methamphetamine packed around the gas cap and filler tube area. The baggies proved to contain 53.49 grams of nearly pure methamphetamine. This quantity of methamphetamine would make over 2500 doses of methamphetamine. The drug-sniffing dog also alerted on the ashtray in the cab of the truck; the ends of two burned marijuana cigarettes were in the ashtray. The officers at the scene arrested defendant and Jolly. They found $2,847 in cash, mainly in $20 bills, in defendant's front pants pocket. The money was rubber-banded into three bundles. The denominations of money were consistent with drug sales. Jolly also had $410 in his wallet. Both defendant's and Jolly's money were drug-

tainted.[1]

Defendant's theory of the case was that he was the victim of a government conspiracy, including planting the drugs on him in order to convict him. He did not testify, however, and presented only one witness. Defendant's sole witness, his stepdaughter, testified that she had received about $21,000 in a settlement from automobile accident. On August 8, 1994, a little over three weeks before defendant's arrest, she bad withdrawn $8,000 from her settlement proceeds and given it to defetndant so he could pay some bills. This evidence was offered to explain why defendant had such a large amount of cash in his pocket.

Defendant was charged in the second amended information with one count of transportation of methamphetamine, in violation of Health and Safety Code section 11379, and one count of possessing methamphetamine for sale, in violation of Health and Safety Code section 11378. The second amended information alleged as an enhancement under Health and Safety Code section 11370.2, that defendant bad previously been convicted of conspiracy to possess or purchase controlled substances for sale, a violation of Health and Safety Code section 11351.

The court bifurcated trial on the enhancement prior

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[1]Officer Mendenhall testified that he had another officer hide both defendant's and Jolly's money in different places in the office. The dog alerted to both locations Officer Mendenhall testified that his dog must be certified each month. He also has conducted tests of cash from banks and from Nevada casinos. As a result of experiments he has conducted, Officer Mendenhall observed that cash must have been in recent proximity to drugs, within 24 to 48 hours at the most, to have the dog alert on the cash. The dog does not alert to cash which has not been in contact with drugs within a very recent time frame.

from trial on the current charges. The jury found defendant guilty of the current offenses. Defendant admitted the enhancement allegations.

The trial court sentenced defendant to state prison for three years on count one, plus three years for the enhancement as to that count. The court stayed imposition of sentence as to count two and its enhancement, pursuant to Penal Code section 654.

Defendant now appeals.

DISCUSSION

I. Defendant Knowingly and Intelligently Waived His Right to Counsel

During at least the first year after he was charged with the current crimes, defendant had several appointed and retained counsel. He frequently asked for continuances to obtain new counsel and made several motions to discharge counsel under *People v.. Marsden* (1970) 2 Cal.3d 118.

Defendant's theory of the case was that he was framed by a huge governmental conspiracy, which ultimately included all the prosecuting attorneys, all the judges who made rulings in his case, and any counsel appointed by the court. Defendant also refused to acknowledge that, if he were represented by counsel, counsel not defendant, would be in charge of handling the case.

Defendant more than once asked to represent himself, pursuant to his constitutional right to do so, as articulated in *Faretta v. California, supra,* 422 U.S. 806 [95 S.Ct. 2525; 45 L.Ed.2d 562]. Each time he requested pro. per. status, however, defendant scrawled additional comments on the form advising him of the risks of self-representation, and the benefits be would be giving up by not baying counsel representing him. Defendant initialed his understanding of all the statements on the advisement form, but added that he still wanted "all my rights." He also purported to sign "under protest."

Defendant now claims that the record "evinces a doubt" whether he knowingly and intelligently waived his right to counsel. The contention is patently without merit. The court patiently went over all the admonitions on the form with defendant. Defendant's primary motivation was that he wanted to be in complete and direct control of the conduct of Iris case. He was unwilling to let an attorney decide upon tactics, which witnesses to call, the reasonableness of any line of defense, how to conduct examination and cross-examination of witnesses, or any other matter.

Defendant steadfastly, stubbornly, and wrongly maintained that; if an attorney conducted these activities on his behalf; that he was somehow being deprived of his constitutional rights. When a criminal defendant is represented by counsel, the constitution does not provide the right to the defendant to have all the hands-on control of the case. "'"'When the accused exercises his constitutional right to representation by professional counsel, it is counsel, not defendant, who is in charge of the case. By choosing professional representation, the accused surrenders all but a handful of 'fundamental' personal rights to *counsel's* complete control of defense strategies and tactics."' [Citation.]" (*People v. Scott* (1997) 15 Cal.4th 1188, 1207, italics in original.) The constitution does not require otherwise

Manifestly, defendant well understood how the case would be conducted if he accepted counsel, and how the case would be conducted if he acted as his own attorney. With eyes wide open, he freely chose to represent himself.

II. The Court Was Not Reouired to Hold a Competency Hearing

One of the times that defendant moved to represent himself was on the eve of his preliminary bearing. The court conducting that proceeding advised defendant of the risks and pitfalls of self-representation. Because of defendant's

conflicting statements on, the form that he wished to represent himself; and at the same time did not want to give up any of his rights, the court was initially uncertain whether defendant's understanding was impaired in some way, or whether he was merely being obstructionist. In an abundance of caution, the court appointed defense counsel for purposes of conducting the preliminary hearing. Appointed counsel informed the court, however, that defendant had represented himself in the past. "many, many times. And nobody has ever found him 1368. And I cannot at this time make the representation to the court that he is 1368."

Defendant now urges that, despite "continuing doubts" about defendant's competence, the court granted defendant's motion to represent himself.

This contention is also without merit. The court discerned clearly that defendant was not incompetent, but merely that he wanted to focus on his own issues. As defendant acknowledges, "A trial court is required to conduct a competency hearing, sua sponte if necessary, whenever there is substantial evidence of mental incompetence." (*People v. Howard* (1992) 1 Cal.4th 1132, 2163.)

There was no such evidence here, much less substantial evidence. As the preliminary hearing judge astutely observed, defendant knew very well what was going on, but seemed bent on trying to inject error into the record. There was no evidence of incompetence, and thus no reason to bold a hearing. (See *People v. Price* (1991) Cal.4th 324, 396-397.)

III. Defendant Had No Right to Advisory Counsel.

Defendant made many requests to appoint stand-by or advisory counsel. He contends that the court's refusal to grant any of these requests was based upon a fundamental misunderstanding of the court's discretion. From certain statements made by the court, defendant infers that the court believed it had no discretion in any case to afford a pro. per.

defendant advisory counsel, when in fact such a procedure is permitted under the constitution. (See, e.g., *People v. Bloom* (1989) 48 CaL3d 1194, 1219 ["a self- represented defendant who wishes to obtain the assistance of an attorney in an advisory or other limited capacity, but without surrendering effective control over presentation of the defense case1 may do so only with the court's permission and upon a proper showing"]; *People v. Bigelow* (1984) 37 Cal.3d 731, 742 [California law permits the court, in its discretion, to allow a pro se defendant to have advisory counsel, if that procedure will "'best promote orderly, prompt and just disposition of the cause."'].)

Even if it is permissible in certain circumstances to appoint advisory counsel, a pro. per. defendant has no right to have advisory counsel. The court afforded defendant here many opportunities to show why he would need the assistance of advisory counsel. Defendant could articulate no reason why he needed such an appointment. Indeed, defendant proved himself unwilling to cooperate in any manner with any counsel, advisory or otherwise.

Defendant's many requests for advisory counsel were transparent attempts to manipulate the proceedings. A defendant represented by counsel does not have the right to control the attorney's conduct of the case. Defendant's desire for the appointment of counsel was simply an attempt to evade this fact. Defendant wanted to be represented by an attorney, and yet to dictate and control all the attorney's actions, while represented defendants have no such right. (*People v. Clark* (1992) 3 Cal.4th 41, 111-112 [even if the court granted the motion for self-representation in deference to the defendant's desire to control the proceedings, the court was "not also required to place an attorney under the personal direction of someone with defendant's history of manipulative, obstructive and abusive conduct"].)

Defendant's claim that the court misunderstood the scope of its discretion is without merit. At one point, the court did appoint the public defender as advisory counsel, but the public defender declined to serve in that capacity. Even if some defendants might be able to work with advisory counsel, this defendant showed no such capacity. He was very difficult to work with and trusted no one. There was no reason, such as promotion of justice or efficiency, to appoint advisory counsel for this defendant. (See *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1004; *People v. Clark*, supra, 3 Cal.4th 41, 97, 112.)

We reject defendant's claim that his conviction should be reversed for failure to give him advisory counsel.

IV. Defendant Was Provided Meaningful Self-Representation

In a kitchen-sink style argument, defendant contends that various of the court's rulings and actions deprived him of the opportumty meaningfully to represent himself. That is, he complains that the court failed to appoint advisory counsel for him, refused to entertain defendant's oral motions and required him to put them in writing as provided in court rules, failed to ensure that defendant got all his medication for his migraine headaches, failed to ensure that defendant was able to use the law library in the jail, failed to see that defendant was given paper and pencils to prepare his defense, failed to appoint a professional investigator, and, although the court allowed defendant's wife to assist him and run errands for him, the court refused to provide additional assistance in, for example, preparing-and serving subpoenas for defense witnesses.

Defendant was afforded a meaningful opportunity to represent himself. The court ordered that he have pro.. per. privileges at the jail, including access to the law library. The court ordered that defendant have daily contact with his wife, who was assisting him in bringing documentary

evidence to court and in serving subpoenas. The court orderedthat the jail doctor provide defendant with his prescribed medication.

Defendant complains that he should have been allowed a requested continuance to obtain witnesses, because he told the trial court his wife was having trouble serving some subpoenas for witnesses. The court denied the motion for a continuance as untimely.

The motion was untimely. Defendant bad plenty of notice and opportunity to prepare subpoenas. He does not even argue what witnesses he was deprived of the opportunity to present or what their testimony would have been. He likewise makes no showing of what materials he needed that he did not receive, or how these materials would have aided in the defense.

Defendant's desired defense was to call all his past attorneys and any judge who had ever made mlings in his case to "prove" a vast governmental conspiracy against him. He made no proffer of relevant evidence, information, or witnesses, of which he was deprived. (Compare the instant case with, e.g., *People v. Cruz* (1978) 83 Cal.App.3d 308, 325 [the defendant's defense was unconsciousness on account of involuntary intoxication; the pro. per. defendant was unable to undertake necessary personal investigation. Only the defendant himself could reconstruct his whereabouts, and could not do so while in custody. He was the only one who knew the man who allegedly spiked his drink. He was denied the services of an investigator to find this witness. Denial of a continuance to prepare -- where there was a showing that there was a viable defense to prepare -- was prejudicial error].)

Defendant was afforded as meaningful an opportunity as possible to address the charges against him; he simply refused to acknowledge the validity of the proceedings. Defendant has made no showing that he was deprived of

any meaningful trial right.

DISPOSITION

Defendant's contentions on appeal are without merit. The judgment is affirmed.

NOT FOR PUBLICATION

/s/ Ward, J.

We concur:

/s/ Ramirez, P.J.

/s/ Gaut, J.

Appendix B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. ED CV-99-269-RT (CT)

RALPH ELLIS LEYVAS,
Petitioner
v.
PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Filed:
Clerk, U.S. District Court
June 22, 2001

Entered on ICMS
June 25, 2001

This report and recommendation is submitted to the Honorable Robert J. Timlin, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. For the reasons discussed below, it in recommended that the petition be DENIED AND DISMISSED WITH PREJUDICE.

SUMMARY OF PROCEEDINGS

On July 23, 1999, petitioner filed the initial petition fox-writ of habeas corpus ("initial petition") in the United States District Court for the Eastern District of California. Petitioner

prepared the petition during the period of time that he was an inmate at Folsom State Prison and used his prison number and address on the petition. Petitioner was released from prison on the name day that the initial petition was file-stamped by the court, July 23, 1999. Petitioner submitted a change of address form to the Post Office, directing that mail addressed to him at Folsom prison should be sent to his new address. The case was transferred to this court on August 3, 1999 and filed in this court on August 11, 1999.

By order dated August 31, 1999, the court granted leave to amend, to name the proper respondent and to show exhaustion of state court remedies. No amended petition was filed by the date specified, and the petition was dismissed for failure to prosecute

In February 2001, petitioner moved to vacate the dismissal, based on lack of notice. On March 26, 2001, the Court granted petitioner's motion and ordered the first amended petition filed.

The first amended petition ("petition"), was filed in this court on March 26, 2001. Petitioner is on parole and represented by counsel. On April 26, 2001, respondent filed a return. On May 23, 2001 petition filed a traverse and transcripts ordered by the court. On June 8, 2001, petitioner filed an additional transcript pursuant to this court's order.

BACKGROUND

On May 23, 1996, a jury convicted petitioner, who represented himself at trial, of transporting methamphetamine and possessing methamphetamine for sale. (CT 240-44).[1] Petitioner admitted to enhancements on

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[1]"RT" generally refers to the reporter's transcript of the proceedings. Because of the number of separate reporter's stanscripts which have ben lodged, RT will be preceded by the date on which the transcribed hearing took place. "CT" refers to the clerk's transcript. Each reference will be followed by the applicable

both counts. The trial court sentenced petitioner to six years in state prison. (CT 287; 290.)

While awaiting sentencing, petitioner filed a petition for writ of habeas corpus in the Superior Court for Riverside County raising essentially one ground: The trial court denied petitioner his Faretta[2] rights (422 U.S. 806) by failing to hold a competency hearing prior to accepting a waiver of counsel, by failing to advise petitioner of the maximum sentence and pitfalls of self-representation at felony trial, and by allowing petitioner to represent himself despite mental problems and by failing to obtain a knowing and intelligent waiver of right to counsel. (Petition at 4; CT 249-70). On July 31, 1995, the Superior Court denied the petition for failure to state a prima facie case and failure to exhaust administrative remedies. (CT 272-73).

After his sentencing, petitioner appealed to the California Court of Appeal, raising the following grounds:[3]

1. [Petitioner] was denied his right to meaningfully represent himself;

2. The trial court prejudicially erred when it denied [petitioner's] motion for appointment of advisory counsel on the mistaken premise that it had no discretion to make such an appointment;

3. The court had a sua sponte duty to hold a competency hearing when informed of facts suggesting [petitioner's] inability to assist in his own defense; and

4. The state did not carry its burden of proving that

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page number(s). "Lodgment" refers to documents lodged by respondent with the return.

[2]Faretta refers to Faretta v. California, 422 U.S. 806, 834 (1975).

[3]Grounds raised in this court and below are set forth essentially as articulated by petitioner.

[petitioner] intelligently and knowingly waived his right to counsel. (Lodged Document, Appellant's Opening Brief).

On July 13, 1998, the court of appeal affirmed the trial court in a reasoned, unpublished opinion, which is attached hereto as an exhibit.

On March 13, 1998, petitioner filed a petition for writ of habeas corpus in the California Court of Appeal which raised the same ground raised in the superior court. (Lodgment 7). On March 31, 1998, the court of appeal denied the petition without comment or citation to authority.

On April 20, 1998, petitioner filed a petition for writ of habeas corpus with the California Supreme Court, raising the grounds he had below. On September 30, 1998, the court denied the petition without cotnxrient or citation to authority. (Lodgment 10).

CONTENTIONS

In this federal petition, petitioner raises one ground: petitioner was denied his Faretta rights by the trial court's acceptance of his request for self-representation without required warnings, and without knowing and intelligent waiver of the right to counsel.

FACTUAL SUMMARY

The California Court of Appeal's summary of the facts relating to the drug charges is supported by the record and incorporated herein. Essentially, petitioner was stopped while driving erratically and police smelled burning marijuana. A search of the vehicle revealed methamphetamine and cash.

The facts relating to the ground raised in this federal habeas petition are as follows. Petitioner had several different retained and appointed counsel during the more than one year period after his arrest. (See, e.g., 9/20/94 RT 1, 3-4, 10/5/94 RT 1; 3/39/95 RT at 7-15). He made several requests for continuances to obtain new counsel and also made several motions for new appointed counsel under

People v. Marsden, 2 Cal. 3d 118 (1970) ("Marsden"). (2/2/95 RT 1-2).

Petitioner refused to accept any attorney who would not allow petitioner to have full control over the case. Petitioner consistently argued to several different judges that because previous retained and appointed attorneys did not allow petitioner to exclusively control the defense (including allowing petitioner to decide which witnesses to call and allowing petitioner personally to cross-examine witnesses and perform other functions at trial), petitioner was deprived of his federal constitutional rights. (See, e.g., 2/25/95 RT 4-5; 3/30/95 RT 16; 4/14/95 RT 23-30; 11/3/95 RT 37-44; 5/3/96 RT 9-10).

On April 14, 1995 petitioner requested permission to represent himself, which, was granted. (CT 42)[4] Petitioner completed a form petition to proceed in propria persona. He both initialed the blanks indicating that he understood his rights to counsel and wished to give them up, and also wrote in several places, "1 want all my rights" and "signed under protest". (CT 19). After an extensive colloquy with petitioner, a different judge on the same day found petitioner's request to represent himself was equivocal, revoked his pro per status, and reappointed counsel. (CT 55-56). The court expressed concern over petitioner's mental competence, and engaged in a colloquy with appointed counsel on the subject. Apppointed counsel indicated that petitioner seemed to understand what appointed counsel said to him, and that petitioner was "well versed" and had represented himself "many, many times" and had not been found incompetent. (CT 58-60).

On June 16, 1995, at another pre-trial hearing before a different judge, petitioner informed the court he wanted to

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[4]The transcript of the afternoon session on April 14, 1995 is found in the clerk's transcript.

relieve retained counsel. The court granted petitioner's Marsden motion. (6/3.6/95 RT at 16. The court then conducted a colloquy with petitioner regarding his request to represent himself. (Id., at 16-21). On his form request, petitioner again initialed all of the blanks indicating that he understood his rights to counsel and that he waived them. He pencilled in that he wanted "all his rights" and that he was "forced to sign under protest." (CT 102). The court strongly advised petitioner to accept appointed counsel. (6/16/95 RT 18). Petitioner responded, "That's the government's advice. Well, I don't want that advice." (Id.) The following discussion between the judge and petitioner ensued:

> THE COURT: Do you understand that if the court does permit you to represent yourself, it will be necessary for you, without the assistance of counsel, to conduct, on your own, a trial, which may consist of making pretrial and preliminary hearing motions, empaneling a jury, making an opening statement, cross-examining the witnesses, subpoenaing and presenting any evidence or any witnesses that you may need to call into court, making appropriate objections during the course of the trial, preparing and presenting to the court any proper proceedings, jury instructions, and making your final arguments in your trial? So you understand that those are all the kinds of things that you will need to be prepared to do should you represent. yourself in this case?
> THE DEFENDANT: I most certainly do.
> THE COURT: And do you think you can do that?
> THE DEFENDANT: Yes, ma'am, I do.
> THE COURT: And do you understand that in the event of a conviction and an appeal, by acting as your own lawyer, you're giving up and waiving, as a possible ground for appeal, your constitutional right to effective

counsel? Do you understand that?

THE DEFENDANT: No ma'am. I don't give up any of my rights. None whatsoever. None.

THE COURT: You've initialed that you understand that.

THE DEFENDANT: I signed that under protest, ma'am.

THE COURT: Do you understand that, sir? Do you understand that is something that you would be giving up today?

THE DEFENDANT: I don't want to give up any of my rights. I understand what you said, yes. (6/16/95 RT 19-20).

The court granted the petition to proceed pro se. (Id. at 21)

DISCUSSION

Standard of Review

An application for a writ of habeas corpus on behalf of a person in custody pursuant to a state court judgment shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim either: (1) resulted a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme court; or, (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. 1 2254(d) (as amended by the "Antiterrorism and Effective Death Penalty Act of 1996" ("AEDPA"). See also Williams v. Taylor, 529 U.S. 362, 412 (2000) (stating that section 2254(d)(1) places a "new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. See also Van Tran v. Lindsey, 212 F.3d 1143 (9th Cir. 2000), cert. denied, ___ U.S. ___, 121 S.Ct. 340 (2000)

The United States Supreme Court has held that "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding the judgment or rejecting the same claim rest upon the same ground. Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991). When confronted with a state court decision which does not provide reasoned explanation for the result it reaches, a federal court must conduct an independent review of the record to determine "whether the state court clearly erred in its application of controlling federal law." Delgado v. Lewis, 223 F.3d 976, 981 (9th Cir. 2000). The state courts reviewed petitioner's claims on habeas corpus and issued silent denials.[5] However, the court of appeal considered similar claims on direct appeal and issued a reasoned opinion. This court has conducted an independent review of the record, under the applicable standard of review, and as part of that review, has taken into account the reasoned opinion of the court of appeal.

Sixth Amendment

The right to assistance of counsel in criminal prosecutions is guaranteed by the Sixth Amendment to the United States Constitution. The purpose of providing assistance of counsel is 'simply to ensure that criminal defendants receive a fair trial." Strickland v. Washington, 466 U.S. 688, 689 (1984). A criminal defendant is not guaranteed a "meaningful relationship" with counsel. Morris v. Slappy, 461 U.S. 1, 13 (1983). Therefore, the right to choose one's counsel is qualified. Wheat v. United States, 486 U.S. 153, 159 (1988) (holding that district court has broad discretion to decline substitution of counsel where conflict of interest exists, and stating, "the essential aim of the [Sixth]

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[5]The record in this court does not contain a copy of the superior court's denial of the state habeas petition. Petitioner indicates that the petition was summarily denied. (Petition at 4.)

Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.")

The Sixth Amendment guarantees the corresponding right to waive counsel and choose self-representation. Faretta v. California, 422 U.S. 806, 834. The Constitution requires that such a waiver be knowing, voluntary, and intelligent. Id. A criminal defendant must be "made aware of the dangers and disadvantages of self-representation." Id. at 835

The Supreme Court has acknowledged that a criminal defendant who opts to represent himself will often not have as effective a defense as a defendant represented by counsel. Faretta at 834. See also Goodinez v. Moran, 509 U.S. at 399 (1993) (noting that defendant's lack of competence in legal matters is not relevant to the defendant's right to self-representation.) However, neither the lack of technical legal competence nor the inability to put on an effective defense constitutes a legitimate ground for denying the right of self-representation. United States v. Hernandez, 203 F.3d 614, 623, n. 12 (9th Cir. 2000).

Competence

Petitioner argues that his waiver was not voluntary and intelligent because he was not mentally competent to waive his rights or to defend himself. (Petition at 6; Memorandum of Points and Authorities in Support of Motion to Vacate Dismissal on Grounds of Lack of Notice at 12-15). Petitioner points to the following in support: the court did not hold a competency hearing,[6] petitioner did not sign the waiver form, petitioner wanted to conduct a prohibited defense, and petitioner irrationally thought appointed counsel was aligned with the prosecution.

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[6]As discussed in this section, the trial court reasonably concluded that a competency hearing was not required.

A defendant may not waive his or her right to counsel unless he or she does so competently and intelligently. Goodinez v. Moran, 509 U.S. 389 (1993). The competence required to waive the right to counsel is the competence to waive the right, not the competence to represent oneself. Id., requires nothing more than that a defendant have some minimal understanding of the proceedings against him." United States v. Hernandez, 203 F.3d at 621, n. 8, citing Goodinez, 509 U.S. at 396. The defendant's technical legal knowledge or ability to represent him or herself is not relevant to determining whether he or she is competent to waive the right to counsel. Goodinez, at 398-400. The filing of meritless motions without a logical or legal foundation does not in itself justify the denial of a defendant's right to represent himself on the ground that he is not competent. United States v. Arlt, 41 F.3d 516, 518 (9th Cir. 1994).

To the extent that petitioner contends that the trial court erred under California law by not holding a competency hearing, that claim is not cognizable on federal habeas review. See 28 U.S.C. S 2254(a); Estelle v. McGuire, 502 U.S. 62, 68 (1991). Due process requires a trial court to hold a competency hearing sua sponte if the evidence before it raises a reasonable doubt whether a defendant is mentally competent. Pate v. Robinson, 383 U.S. 375, 385 (1966). See also Hernandez v. Ylst, 930 F.2d 714, 716 (9th Cir. 1991). Though no one of these factors is determinative, a reviewing court may consider defendant's irrational behavior, his demeanor in court, and any prior medical opinions on his competence. Miles v. Stainer, 108 F.3d 1109, 1112 (9th Cir. 1997).

On direct review, the court of appeal considered petitioner's general argument that the waiver was not voluntary and intelligent, opined as follows:

> Each time (petitioner) requested pro per status, however, petitioner scrawled additional comments on

the form advising him of the risks of self-representation, and the benefits he would be giving up by not having counsel representing him. Petitioner initialled his understanding of all the statements on the advisement form, but added that he still wanted "all my rights.'" He also purported to sign under protest."

Petitioner now claims that the record "evinces a doubt" whether he knowingly and intelligently waived his right to counsel. The contention is patently without merit. The court patiently went over all the admonitions on the form with petitioner. Petitioner's primary motivation was that he wanted to be in complete and direct control of the conduct of his case. He was unwilling to let an attorney decide upon tactics, which witnesses to call, the reasonableness of any line of defense, how to conduct examination and cross-examination of witnesses, or any other matter.

Petitioner steadfastly, stubbornly, and wrongly maintained that, if any attorney conducted these activities on his behalf, that he was somehow being deprived of his constitutional rights. When a criminal defendant is represented by counsel, the constitution does not provide the right to the defendant to have all the hands-on control of the case...

Manifestly, petitioner well understood how the case would be conducted if the accepted counsel, and how the case would be conducted if he acted as his own attorney. With eyes wide open, he freely chose to represent himself. (Opinion at 5-6).

Based on this court's review of the record as a whole, this court concurs. Petitioner clearly and consistently insisted that he only wanted counsel if he could control the defense. Petitioner was repeatedly informed by the court that this approach was not acceptable. Faced with the choices available to him, petitioner chose to represent himself.

This is not a case where petitioner was put to the unconstitutional choice between representing himself or proceeding without counsel. See, e.g., U.S. v. Robinson, 913 F.2d 712, 714 (9th Cir. 1990) (on direct review,, forcing a defendant to choose between self-representation and assistance of an attorney with whom he has some conflict, where no cause for a substitution is shown, does not put the defendant to an unconstitutional choice); U.S. v. Flewitt, 874 F.2d 669, 672-73 (9th Cir. 1989) (same). Compare Crandall v. Bunnell, 144 F.3d at 1215-16 (where attorney is incompetent, requiring a criminal defendant to choose between proceeding pro me, or with attorney, was an unconstitutional choice).

In his traverse, petitioner argues that his request to represent himself was equivocal, because he made the request only after the Court refused to accommodate his (unreasonable) request for counsel. Petitioner's request was not equivocal. Petitioner consistently insisted that counsel, appointed or retained, allow petitioner complete control over his defense, a condition which was impossible to meet. The unreasonable, unmet condition. imposed by petitioner did not render his subsequent waiver invalid. See, e.g., United States v. Hernandez, 203 F.3d at 621 (fact that defendant asked to represent himself only because the court would not grant his request for new counsel was not evidence that request was equivocal); Adams v. Carroll, 875 F.2d 1441, 1444 (9th Cir. 1989) (conditional request not evidence of equivocation).

Petitioner argues that the fact that he believed, and wanted to argue in his defense that be was the victim of a vast government conspiracy shows that he was not competent to waive his Sixth Amendment rights. The fact that petitioner wanted to present arguments without a logical or legal foundation would not have, in itself, justified the denial of a defendant's Sixth Amendment right to represent himself. See United States v. Arlt, 41 F.3d 516 (9th

Cir. 1994).

Moreover, the state courts found that petitioner's behavior indicated a desire to derail the proceedings and create appellate error, and found that a competency bearing was not needed. Considering petitioner's state law claim, the court of appeal opined as follows:

> The court discerned clearly that petitioner was not incompetent, but merely that he wanted to focus on his own issues ...
>
> There was no evidence [of mental incompetence] here, much less substantial evidence. As the preliminary hearing judge astutely observed, petitioner knew very well what was going on, but seemed bent on trying to inject error into the record. (Opinion at 7).

This court concurs. This court notes that before the preliminary hearing, the judge inquired of appointed counsel whether counsel believed a competency hearing was advisable. Counsel replied:

> I've tried to explain to him (petitioner) what a preliminary hearing is. It seemed to me that he understood what a preliminary hearing is ... He insisted that I [call thirty-plus witnesses at the preliminary hearing], and I told him I would not do that. He did understand that I said that.
>
> I was appointed to this case with the caveat that [petitioner] has sued almost every lawyer that's ever represented him plus every judge that he's been before. And he's well versed and has represented himself many, many times. And nobody has ever found him 1368. And I cannot at this time make the representation to the court that he is 1368. (CT 59-60.)

[7]
Trial counsel's opinion that a competency hearing is not required is significant. Hernandez v. Ylst, 930 F.2d at 717.

The preliminary hearing judge earlier observed that petitioner was obviously intelligent and clearly understood what he was doing, that he was obstructionist and trying to build appellate error. (CT 35-36).

The trial judge observed:

> It is obvious to me that there is nothing wrong about your cognitive ability ... You may be difficult from time to time and you may be argumentative from time to time, but you certainly have never exhibited that you don't know what is going on and that you are not in full control of your faculties, so I don't see any infirmity that is being shown in front of me as to your readiness to proceed, that is, from a competency standpoint. (RT 13).

This court independently notes that petitioner appeared willing to go to some lengths to proceed only if he got his way. For example, petitioner told one pre-trial judge that if he was forced to proceed with an attorney who would not follow his instructions, he would get sick. Petitioner subsequently failed to appear in court, having been taken by ambulance to the hospital. The court found petitioner's absence was not involuntary and issued a warrant for his arrest. (3/30/95 RT 16-18).

With his traverse, petitioner has submitted medical records to support his claim that his incompetence to represent himself was exacerbated by his being denied medication by jail officials, which resulted in debilitating migraine headaches and inability to concentrate. The

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[7] 1368 refers to Cal. Penal Code § 1368 which sets forth procedures to be followed where there are doubts about a defendant's mental competence.

evidence submitted by the traverse does not appear as part of the record submitted to the California Supreme Court. Therefore, to the extent that petitioner has presented this court with new operative facts, this federal petition is unexhausted. However, this court may deny an unexhausted petition on the merits. See 28 U.S.C. § 2254(b)(1)(A); (b)(2).

The new evidence does not support petitioner's contention, but simply shows that petitioner received treatment for migraines after his arrest while he was out of custody on bail. The mere fact that petitioner received treatment for migraines does not raise a "bona fide doubt" as to his competence to stand trial. See Sturgis v. Goldsmith, 796 F.2d 1103, 1109 (9th Cir. 1986) (failure to present evidence of how medical problem affected competence at trial did not raise bona fide doubt as to petitioner's competence.)

Advisements

Faretta does not mandate a constitutionally required "litany or formula when considering whether a waiver of counsel is knowing and intelligent." Lopez v. Thompson, 202 F.3d 1110, 1118 (9th Cir. 2000) (en banc). Generally, this circuit has required that a criminal defendant be made aware of: (1) the nature of the charges against him; (2) the possible penalties faced; and (3) the dangers and disadvantages of self-representation. United States v. Hayes, 231 F.3d 1132, 1136 (9th Cir. 2000). An exception to this requirement exists where the trial court has granted a request to proceed pro se, and in some cases failure to inform a criminal defendant of these three elements does not necessitate reversal where "the record as a whole reveals a knowing and intelligent waiver." United States v. Hernandez, 203 F.3d at 624, n. 13.

Penalty

Petitioner contends that because he was not advised of the maximum penalty he faced, his waiver of counsel was not knowing and intelligent. The record reflects that the trial judge first informed petitioner of the maximum penalty he

faced on May 15, 1996, during trial. (RT 162). However, the record as a whole indicates that: the complaint against petitioner contained information which would have alerted petitioner to his potential sentence; petitioner was aware that he faced a state prison term; and that, when informed of the potential sentence, petitioner did not express surprise or reassert his right to counsel. The record also shows that petitioner was not a stranger to the criminal justice system, having several previous convictions involving possession for sale of controlled substances.

The original complaint, filed in September 1994, charged petitioner with two felonies, violations of Cal. Health and Safety Code §§ 11378 and 11379. Section 11379 states that a violation of that section shall be punished by imprisonment in the state prison for a period of two, three, or four years." Section 11379 states that a violation shall be punished by "imprisonment in the state prison." The information was amended in June 1995, shortly after petitioner was granted permission to represent himself. The second amended information alleged enhancements under Cal. Health and Safety Code § 11370 .2 (c), which provided for a consecutive three year sentence for each of the charged felonies.

Petitioner was represented by several different lawyers at different stages of the proceedings. One of petitioner's retained counsel wrote to petitioner on June 16, 1995, the day that counsel was relieved and petitioner granted pro per status. Counsel reminded petitioner that he had informed petitioner "on several occasions" that it was inadvisable for him to represent himself because, among other reasons, petitioner faced a state prison term if convicted. (CT 126-27)[8]

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[8]The letter from counsel was submitted as an exhibit to a motion for continuance drafted by petitioner. The court notes that the motion is coherent and well-reasoned. (CT 120-124.)

During trial, several months later, petitioner asked the trial judge, "how much time am I looking at if I am convicted on this?" (5/15/96 RT at 162). Petitioner made no comment, expressed no surprise, and did not assert his right to counsel when the judge responded that petitioner's maximum exposure was ten years. (Id.. at 163). Likewise, at sentencing, where petitioner was represented by counsel, petitioner had no comment and expressed no surprise when the trial judge sentenced him to six years in prison. (8/13/96 RT at 633-34).

The record also reflects that petitioner was familiar with the criminal justice system. Cf. Derrick v. Peterson, 924 F.2d 813, 824 (9th Cir. 1990) (finding waiver of Fifth Amendment rights valid, in part, because suspect had past experience with the criminal justice system). Petitioner was previously convicted of felonies involving the possession for sale of controlled substances, and was sentenced to state prison. (RT 432-40, 631; CT 280).

Considering the record as a whole, the court finds that the lack of an express statement from the trial judge earlier in the proceedings regarding petitioner's potential maximum sentence did not render petitioner's request to represent himself involuntary.

Dangers of Self-Representation

To the extent that petitioner argues that the trial judge did not otherwise warn him about the dangers of representing himself, that claim does not warrant habeas relief. The Ninth Circuit has recently found that an explanation of the dangers and disadvantages of self-representation based on the California Judge' Benchbook comports with the requirements of Faretta. United States v. Hayes, 231 F.3d 1132, 1138-39. The discussion cited by the Ninth Circuit closely tracks the advisement given to petitioner by the judge who granted petitioner's pro per status. (6/16/95 RT at 18-20, set forth above at page 6).

The record as a whole supports the decisions of the

California courts that petitioner's waiver of his Sixth Amendment rights was knowing, voluntary, and intelligent. Habeas relief is not warranted.

CONCLUSION

After independent review of the record, this court finds that the California Courts' adjudication of these claims did riot involve an unreasonable determination of the facts in light of the evidence presented in the state court proceedings, nor an unreasonable application of clearly established federal law, as determined by the United States Supreme Court. As a result, habeas corpus relief is notwarranted.

RECOMMENDATION

. In accordance with the foregoing, it is recommended that the court issue an order: (1) accepting this report and recommendation; and (2) directing that judgment be entered denying and dismissing the petition with prejudice.

DATED: June 22, 2001

/s/ CAROLYN TURCHIN
UNITED STATES MAGISTRATE JUDGE

Appendix C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. ED CV-99-269-RT (CT)

RALPH ELLIS LEYVAS,
Petitioner
v.
PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

JUDGMENT

Filed:
Clerk, U.S. District Court
July 25, 2001

Entered
July 31, 2001

Pursuant to Order Accepting and Adopting the Report and Recommendation of the United States Magistrate Judge, and Denying the First Amended Petition for Writ of Habeas Corpus with prejudice,

IT IS ADJUDGED that the First Amended Petition is denied with prejudice.

Dated: July 25, 2001.

/s/ ROBERT J. TIMLIN
United States District Judge

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-56636

RALPH ELLIS LEYVAS,
Petitioner-Appellant,
v.
PEOPLE OF THE STATE OF CALIFORNIA; KENNETH DOW,
Respondents-Appellees.

January 14, 2003, Argued and Submitted, Pasadena, California

February 19, 2003, Filed

MEMORANDUM*

*This disposition is not appropriate for publication and may not be cited to or by the cours of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: **HALL**, **KOZINSKY**, and **RAWLINSON**, Circuit Judges.

The state trial court's determination that Leyvas knowingly and intelligently waived his right to counsel was not "contrary to, or ... an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

The court reasonably credited the opinion of Leyvas's preliminary hearing counsel in determining whether a competency hearing was necessary. Leyvas's hypertension,

migraine headaches and dizziness, and his accusations that appointed counsel was conspiring against him, did not give the court reason to doubt his competency, and thus did not require a hearing. See *Godinez v. Moran, 509 U.S. 389, 401 n.13, 125 L. Ed. 2d 321, 113 S. Ct. 2680 (1993).*

The court reasonably determined that Leyvas's waiver of his right to counsel was unequivocal. The court asked Leyvas whether he wanted to represent himself, and he responded, "Yeah. I'll represent myself." The court then listed the benefits Leyvas was foregoing and asked if he understood, to which he responded, "I most certainly do." Finally, the court asked whether he thought he could perform as counsel, and he said, "Yes, ma'am, I do." Leyvas's subsequent refusal to waive his right to bring ineffective assistance claims does not render his waiver of counsel equivocal. His remark that he did not want to "give up any of [his] rights" does not render his waiver of counsel equivocal, because it was also consistent with his invocation of the right to self-representation. *See Faretta v. California, 422 U.S. 806, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975).*

The state court did not unreasonably apply Supreme Court law by failing to inform Leyvas of the sentence he faced. No Supreme Court decision requires the court to impart that information. The court must ensure the defendant is aware of the "dangers and disadvantages of self-representation," *id. at 835*, but this requirement does not clearly extend to information about potential penalties.

Nor did the court unreasonably apply Supreme Court law by failing to inform Leyvas that he would not have the assistance of a competent investigator who could subpoena witnesses for him. Because the court specifically told Leyvas he would have to subpoena witnesses himself, a further warning that an investigator would not do so for him would have been redundant.

AFFIRMED.

Appendix E

STATUTES

FEDERAL STATUTE - 28 U.S.C.

§ 2254. State custody; remedies in Federal courts

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

CALIFORNIA STATUTES - HEALTH AND SAFETY CODE

§ 11378. Possession for sale

Except as otherwise provided in Article 7 (commencing with Section 4211) of Chapter 9 of Division 2 of the Business and Professions Code, every person who possesses for sale any controlled substance which is (1) classified in Schedule III, IV, or V and which is not a narcotic drug, except subdivision (g) of Section 11056, (2) specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), (20), (21), (22), and (23) of subdivision (d), (3) specified in paragraph (11) of subdivision (c) of Section 11056, (4)

specified in paragraph (2) or (3) of subdivision (f) of Section 11054, or (5) specified in subdivision (d), (e), or (f), except paragraph (3) of subdivision (e) and subparagraphs (A) and (B) of paragraph (2) of subdivision (f), of Section 11055, shall be punished by imprisonment in the state prison.

§ 11379. Transportation, sale, or distribution of specified controlled substances

(a) Except as otherwise provided in subdivision (b) and in Article 7 (commencing with Section 4211) of Chapter 9 of Division 2 of the Business and Professions Code, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any controlled substance which is (1) classified in Schedule III, IV, or V and which is not a narcotic drug, except subdivision (g) of Section 11056, (2) specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), (20), (21), (22), and (23) of subdivision (d), (3) specified in paragraph (11) of subdivision (c) of Section 11056, (4) specified in paragraph (2) or (3) of subdivision (f) of Section 11054, or (5) specified in subdivision (d) or (e), except paragraph (3) of subdivision (e), or specified in subparagraph (A) of paragraph (1) of subdivision (f), of Section 11055, unless upon the prescription of a physician, dentist, podiatrist, or veterinarian, licensed to practice in this state, shall be punished by imprisonment in the state prison for a period of two, three, or four years.

(b) Notwithstanding the penalty provisions of subdivision (a), any person who transports for sale any controlled substances specified in subdivision (a) within this state from one county to another noncontiguous county shall be punished by imprisonment in the state prison for three, six,

or nine years.

§ 11370.2. Enhancement of punishment for prior felony convictions related to controlled substances

(c) Any person convicted of a violation of, or of a conspiracy to violate, Section 11378 or 11379 with respect to any substance containing a controlled substance specified in paragraph (1) or (2) of subdivision (d) of Section 11055 shall receive, in addition to any other punishment authorized by law, including Section 667.5 of the Penal Code, a full, separate, and consecutive three-year term for each prior felony conviction of, or for each prior felony conviction of conspiracy to violate, Section 11351, 11351.5, 11352, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11380.5, or 11383, whether or not the prior conviction resulted in a term of imprisonment.